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Nos. 01-1118 & 01-1119

In the Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CATHOLIC CONFERENCE OF ILLINOIS, HIS EMINENCE FRANCIS CARDINAL GEORGE, O.M.I. – ARCHBISHOP OF CHICAGO, CHAIRMAN, MOST REVEREND JOSEPH L. IMESCH – BISHOP OF JOLIET, MOST REVEREND WILTON D. GREGORY – BISHOP OF BELLEVILLE, MOST REVEREND GEORGE J. LUCAS – BISHOP OF SPRINGFIELD-IN-ILLINOIS, REVEREND MSGR. STEVEN ROHLFS – ADMINISTRATOR FOR DIOCESE OF PEORIA, DIRECTORS, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED[1]

Whether under this Court's ruling in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982):

(a) The First Amendment protects citizens engaging in protected speech and expressive conduct from liability for the acts of others where no defendant is found to have specifically intended that others commit acts of violence;

(b) A defendant can be held to have threatened to commit an act of violence for saying specifically that he would engage in "non-violent direct action";

(c) To support a liability judgment the finder of fact is required to identify (1) the specific unprotected conduct from which liability arises, (2) the particular defendant who specifically intended to, and did commit or cause the unprotected conduct and (3) the specific damages caused only by such unprotected conduct and not by any other conduct.

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[1] This brief addresses only the third question presented by the Scheidler defendants' petition, and the fourth question presented by Operation Rescue's petition. Amicus joins the briefs of the parties with respect to the other questions presented.

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INTEREST OF THE AMICUS CURIAE[2]

The Catholic Conference of Illinois ("the Catholic Conference"), an Illinois not-for profit corporation, is an association of the six Roman Catholic dioceses in the State of Illinois. The chairman of the board of directors of the Catholic Conference is His Eminence, Francis Cardinal George, O.M.I., Archbishop of Chicago. The remaining five diocesan bishops in Illinois also serve on the board: Most Rev. Joseph L. Imesch, Bishop of Joliet; Most Rev. Wilton D. Gregory, Bishop of Belleville; Rev. Msgr. Steven Rohlfs, Administrator for the Diocese of Peoria[3]; Most Rev. Thomas G. Doran, Bishop of Rockford; and Most Rev. George Lucas, Bishop of Springfield in Illinois.

The purposes of the Catholic Conference include the promotion of projects common to the six member dioceses, the advocacy of public policy positions which grow out of the Catholic Church's religious, moral and ethical teachings and the education of the public on matters of special concern to the nearly four million Roman Catholics in Illinois. The Catholic Conference has long been involved in the struggle for First

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[2] This brief was not written in whole or in part by counsel for a party and no one other than the Catholic Conference and its members made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

[3] When a see is vacant, the administrator of the diocese in question serves in place of the diocesan bishop on the board of directors of the Catholic Conference.

Amendment freedoms for all Americans and has frequently submitted briefs *amicus curiae* to state and federal courts at all levels.

The Catholic Conference has a deep and continuing interest in the question presented in this case. The indiscriminate application of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.* ("RICO"), to individuals and groups organized to advocate political, moral or religious causes threatens the rights of the Catholic Conference and of all citizens to free speech, free association, free assembly and the free exercise of religion. It not only punishes protected activity after the fact, but also chills protected activity by those who fear the kind of reprisal that this litigation has become. This grave danger warrants this Court's immediate review of the decision below.

The Catholic Conference's interest in this case is therefore twofold. First is the Catholic Conference's deeply and sincerely held religious belief that abortion constitutes the unjustified killing of an innocent human being. This longstanding teaching of the Roman Catholic Church is derived from the Fifth Commandment, "Thou shalt not kill." As Pope John Paul II has observed, "abortion . . . always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being." Pope John Paul II, EVANGELIUM VITAE 62 (March 25, 1995) (See Appendix p. A-6)(hereinafter referred to as "Appendix p. A-__").

Second, the Catholic Conference has a direct interest in ensuring that all opponents of abortion be permitted access to the "marketplace of ideas" on an equal footing

with those who advocate legal abortion. As part of their exercise of faith, Catholics are called as witnesses to proclaim that "[a]bortion and euthanasia are . . . crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection.*" EVANGELIUM VITAE 73 (emphasis in original)(Appendix p. A-6). The Catholic Conference is therefore alarmed at the possibility that its activities advocating the end of abortion, inspired by faith and protected by the Constitution, could somehow be construed as a "pattern of racketeering activity" under RICO. Indeed, in a rare written opinion explaining the decision to grant the Catholic Conference's motion below for leave to file a brief *amicus curiae*, the Seventh Circuit recognized the danger posed to this Amicus as an organization "faced with the same kind of civil RICO claims that formed the basis of the judgment against the appellants." *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.).

REASONS FOR GRANTING THE PETITION

This case requires the Court's immediate review because the decision below, branding pro-life organizers as "racketeers" based on the conduct of others, has created an atmosphere of fear and intimidation that has chilled the exercise of First Amendment rights. The efforts to silence these often controversial voices began as soon as Plaintiffs prevailed in the district court. For example, in 1999, Amicus Francis Cardinal George, O.M.I., Archbishop of Chicago, led a peaceful prayer

vigil with nearly 1000 people, but no speeches or signs, in front of a Chicago abortion clinic.[4] His announcement stated, "[Pope John Paul II] notes [in EVANGELIUM VITAE] that the 'support and promotion of human life must be accomplished through the service of charity, which finds expression in personal witness, various forms of volunteer work, social activity and political commitment. . . .'I will be joining hundreds of others -- not to protest -- but to promote a 'culture of life.'"[5]

In response, the Chicago chapter of Plaintiff N.O.W. released the following statement:

> One way to immediately stop anti-abortion violence and send the message that harassment and terrorism are not acceptable is to ***stop demonstrating, protesting, and holding prayer vigils*** outside of health centers that provide reproductive health care and abortion services. *** 900 people marching down the street and stopping in front of a clinic to pray is confrontational. ***Cardinal George and the participants of Saturday's demonstration have a right to their opinions, however, gathering***

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[4] Steve Kloehn, *Cardinal Takes Lead in Abortion Protest*, CHICAGO TRIBUNE, June 27, 1999, Addendum 1, Revised and Corrected Scheidler Defendants' Memorandum in Support of Their Motion for Judgment as a Matter of Law, No. 86C7888 (filed September 16, 1999) (Appendix p. A-9 - A-13).

[5] *Statement of Francis Cardinal George, O.M.I. re: Prayer Vigil at Centro Medico Abortion Clinic* (Appendix p. A-14).

outside of a clinic is inappropriate and an act of aggression.[6]

N.O.W. suggests that Cardinal George and his fellow citizens are permitted to *have* their own opinions, as long as they do not exercise their constitutional right to *express* those opinions publicly.[7] Unfortunately, the linguistic contortion required to characterize peaceful prayer as "an act of aggression" is no more absurd than calling it extortion or a "pattern of racketeering activity." RICO was intended to combat organized crime. Instead, it has been twisted into a sword of Damocles, threatening every advocate who speaks out against those who possess the resources for unlimited litigation. By broadening RICO to sweep in the petty trespasses that arise in every significant advocacy movement, the lower courts have threatened to turn

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[6] Chicago N.O.W., *Chicago N.O.W. Challenges Cardinal Francis George to Stop Health Center Demonstrations*, undated press release (emphasis added), Addendum 1, Revised and Corrected Scheidler Defendants' Memorandum in Support of Their Motion for Judgment as a Matter of Law (filed September 16, 1999) (Appendix p. A-16).

[7] It is ironic that an ostensible civil rights group like N.O.W. would argue so vociferously *against* the exercise of First Amendment freedoms. Of course, the controversy over abortion has skewed the discussion of many of the legal issues it has touched. As Justice Scalia has lamented, "the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting).

peaceful protest into a "pattern of racketeering activity." This threat chills protected expression, and is therefore prohibited under the First Amendment. The Catholic Conference urges this Court to grant the respective Petitions and remove this threat to freedom.

I. THE STANDARD FOR PUNISHING MIXED PROTECTED AND UNPROTECTED EXPRESSIVE ACTIVITIES REQUIRES THIS COURT'S IMMEDIATE ATTENTION

A. This Case Merits Review Because It Involves An Important Question of Federal Law Concerning The Fundamental First Amendment Rights Of The Public At Large

This court should grant a petition for certiorari when review is necessary to prevent the loss of precious constitutional freedoms, for there can be no more "important question of federal law." *See* Sup. Ct. Rule 10(c). The rights protected by the First Amendment[8] are fundamental, deserving of the utmost protection. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("values enshrined in the First Amendment plainly rank high 'in the scale of our national values'"). The application of RICO to any advocacy movement implicates the freedoms protected by the First

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[8] "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. Amend. I.

Amendment. *See Nat'l Org. For Women, Inc. v. Scheidler*, 510 U.S. 249, 265 (1994) (Souter, J. concurring)("RICO actions could deter protected advocacy . . . courts applying RICO [should] bear in mind the First Amendment interests that could be at stake"). Picketing, leafleting, marching and protesting are time-honored methods of public advocacy. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)(pamphleteering); *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (marches and assemblies); *Thornhill v. State of Alabama*, 310 U.S. 88, 104-05 (1940)(picketing). Advocates also have the right to associate with each other, plan their activities, and assemble in groups to deliver their message. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (right of association is "implicit in the right to engage in activities protected by the First Amendment"); *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Moreover, the "fundamental" right of free exercise of religion would be meaningless without the concurrent freedom to communicate religious and moral beliefs. *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940). Catholics especially are called as witnesses to proclaim publicly that "[a]bortion and euthanasia are . . . crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a ***grave and clear obligation to oppose them by conscientious objection.***" Pope John Paul II, EVANGELIUM VITAE 73 (March 25, 1995) (emphasis in original)(Appendix p. A-10).

This case involves not only the particular defendants' loss of these precious rights, but the proclamation to all that anyone who enters the public square on the controversial issue of abortion risks a racketeering conviction. That threat is now chilling the exercise of First Amendment freedoms and must be removed.

B. A Clear Standard Is Needed To Prevent The Chilling Of Activities Protected By The First Amendment

The lower courts in this case held that RICO liability could be imposed on protest organizers who neither intended, nor knew of, the illegal acts of other persons who happened to attend protests or rallies. The courts below also failed to require jury findings from which a reviewing court could be reasonably certain that only unprotected conduct, specifically intended by these particular defendants, was being punished. The courts below further failed to require specific findings indicating that the damages assessed flowed only from such unprotected conduct, and were only charged to the particular defendant found to have caused the damages in question (See Section II, below).

In the wake of the court of appeals' decision, no citizen wishing to speak out on a controversial issue can feel secure that his or her exercise of the right to free speech and association will go unpunished. If the citizen "conspires" with others to get their message out, and someone who attends a rally or a protest happens to break the law, the citizen is now facing RICO liability.

Thus, N.O.W.'s characterization of Cardinal George's prayer vigil as an "act of aggression" can only be seen as a none too subtle threat intended to deter him from expressing his religious and public policy views. Even though that threat will not silence the Archbishop of Chicago, after the court of appeals' decision, it is likely to silence many others who have the same right to free expression and association as the Archbishop, but are less able to withstand the pro-abortion movement's verbal and legal assaults.

Fortunately, this Court has long recognized that threats to First Amendment freedoms must be considered against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Court can only safeguard this "robust" debate by articulating a clear and strict standard applying *Claiborne Hardware* to RICO and other actions aimed at mixed protected and unprotected expressive activities. Review is therefore necessary not only to correct the error below, but more importantly to remove the chill that has descended upon countless advocates for a variety of causes; a chill that descends from the now clear threat that their expressive conduct may be branded as a "pattern of racketeering activity."[9]

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[9] The district court recognized that at the core of the abortion protest movement is its "ultimate objective - legislation

II. THE DECISION BELOW IS IN CONFLICT WITH THE CLEAR REQUIREMENTS OF *CLAIBORNE HARDWARE*

A. *Claiborne Hardware* Requires "Precision Of Regulation" Of Mixed Protected And Unprotected Expressive Activities, "Judged According To The Strictest Law"

Where the speech and conduct at issue involve a mix of protected and unprotected expressive activity, the court has a duty to ensure that only unprotected activities are punished or deterred. The seminal case is *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where this Court reviewed a judgment against the leaders of a civil rights boycott. There was some violence, particularly against violators of the boycott,[10]

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prohibiting abortions." *Nat'l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 950 (N.D.Ill. 1991), *overruled on other grounds*, 510 U.S. 249 (1994). Similarly, the court of appeals recognized that "'[p]articipants in the protest missions engaged in a substantial amount of protected speech, including efforts to persuade clinic doctors and staff to cease performing abortions." *Nat'l Org. for Women v. Scheidler*, 267 F.3d 687, 693 (7th Cir. 2001).

[10] A group known as the "Black Hats" was formed to enforce the boycott activities and to stand outside of stores to identify, and arguably to intimidate, black customers who entered in violation of the boycott. *Claiborne Hardware*, 458 U.S. at 903-04. Some described the Black Hats as a paramilitary organization. *Id.* at 903 n. 34. Some members of this group committed acts of violence. *Id.* For example, enforcers of the boycott fired shots at a house, threw a brick

but in general the boycott consisted of nonviolent meetings, speeches and picketing. *Id.* at 903. On the other hand, boycott leader Charles Evers did publicly threaten, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

This Court held that although the First Amendment does not create "the right to commit crime," courts are obliged to "examine critically the basis on which the liability was imposed." *Id.* at 895, 915. Speech is protected, even where it "may embarrass others or coerce them into action." *Id.* at 910. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(permitting prohibition of speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

The Court also held that, where the First Amendment is implicated, even the regulation of *unprotected* conduct requires a "precision of regulation." *Claiborne Hardware*, 458 U.S. at 916-17 (the "presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages").[11] Moreover, a court

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through a windshield and stripped a man of his clothing and publicly whipped him. *Id.* at 903-05.

[11] The same is true under RICO. As Justice Souter observed, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in

may not award damages proximately resulting from "the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." *Id.* at 918.[12]

Next, the Court reviewed associational liability under the "precision of regulation" standard:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a ***specific intent*** to further those illegal aims.

Id. at 920 (emphasis added). Moreover, "this intent must be judged 'according to the strictest law.'" *Id.* at 919.[13] If conspiracy is alleged, the plaintiff must also

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protected expression." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J. concurring).

[12] The same requirement for precision of regulation applies to injunctions. The injunction must "restrain only unlawful conduct and the persons responsible for conduct of that character." *Claiborne Hardware*, 458 U.S. 886, 924, fn. 67. *See also Madsen*, 512 U.S. at 767 (requirement that "an injunction burden no more speech than necessary exemplifies precision of regulation").

[13] Citing *Noto v. United States*, 367 U.S. 290, 299-300 (1961)("criminal intent . . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be

plead and prove the specific intent to enter into the conspiracy. *Id.*[14]

Turning to the conduct that supposedly supported liability in *Claiborne Hardware*, this Court noted that the lower court "broadly asserted - without differentiation" (*Id.* at 921) that the defendants had committed tortious acts to enforce the boycott, but that "[t]here is nothing unlawful in standing outside of a store and recording names. . . mere association with [the store watchers or the Black Hats] -- absent a ***specific intent to further an unlawful aim embraced by that group*** -- is an insufficient predicate for liability." *Id.* at 925-26 (emphasis added). Even Evers' threat to "break your damn neck" did not "transcend the bounds of protected speech set forth in *Brandenburg*." *Id.* at 902, 928.[15]

Lastly, this Court in *Claiborne Hardware* required a detailed record and specific fact findings so that the lower court decision could be judged according to the "strictest law":

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punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share"). *See also Scales v. United States*, 367 U.S. 203, 229 (1961) (to punish association, there must be "clear proof that a defendant specifically intended to accomplish the aims of the organization by resort to violence")(citation omitted).

[14] *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (to establish a conspiracy under 42 U.S.C. § 1885(3), plaintiff must allege actual race or class-based animus).

[15] *Cf. Brandenburg v. Ohio*, 395 U.S. 444 (1969).

> [A] characterization [as a violent conspiracy] must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. *Id.* at 933-34.

B. The Courts Below Failed To Apply The "Precision Of Regulation" Standard

The application of RICO to these circumstances smacks of the "guilt by association" prohibited in *Claiborne Hardware*. *See* 458 U.S. at 918-920. Indeed, *Claiborne Hardware* teaches that protected activity cannot serve as any of the essential elements of the cause of action.[16] *Id.* at 916-17 (limiting "the grounds that may give rise to damages liability and . . . the persons who may be held accountable"). After all, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." *Id.* at 908. *But see Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) ("Of course 'outsiders' may be liable . . . if

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[16] Plaintiffs' conspiracy claim introduces another protected association– the "agreement" – which further compounds the problem of "precisely" regulating only unprotected activities.

they are 'associated with' an enterprise and participate in the conduct of its affairs").[17]

Nonetheless, plaintiffs were permitted to introduce evidence that persons not under the defendants' control were somehow caused to take illegal actions by defendants' exhortations, even when those exhortations contained no explicit references to violence.[18] The plaintiffs also were permitted to introduce evidence of heinous crimes, including bombings and murders, committed by persons linked to the defendants only by the fact that they both sought an end to abortion. *Cf. Claiborne Hardware*, 458 U.S. at 930-31 (no vicarious

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[17] As even the court of appeals acknowledged, "*Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN" 267 F.3d at 703.

[18] The court of appeals attempts to link Defendant Scheidler to the "illegal aims" of PLAN with a letter he wrote to abortion clinics, but Scheidler's letter specifically stated that clinics that remained open during a proposed "truce" "would be subjected to 'non-violent direct action.'" 267 F.3d at 695. In contrast, Evers' *protected* speeches in *Claiborne* contained explicit exhortations to commit violence against violators of the boycott, including the statement, "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." 458 U.S. at 902, 928. Accordingly, the court of appeals has relied directly on Scheidler's *protected* speech to impose associational liability. *Cf. Claiborne Hardware*, 458 U.S. at 916-17.

liability permitted without "evidence that the NAACP ratified -- or even had specific knowledge of -- any of the acts of violence or threats of discipline. . . .").

Indeed, the plaintiffs were even allowed to claim that they "felt threatened" by objectively non-threatening and non-violent protest activities because of violence in other parts of the country, totally unconnected to the defendants. By this approach, the plaintiffs converted petty trespass into Hobbs Act extortion, the crucial racketeering predicate in this case. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include violations of the Hobbs Act, 18 U.S.C. § 1951, *et seq.*).

Where plaintiffs did address these particular defendants, they were permitted to introduce volumes of evidence concerning undeniably *protected* activities, such as speeches, rallies, prayer vigils, conferences, leafleting and other activities[19] that are essential to an advocacy movement, all to show the collective guilt of the defendants for any illegal act carried out in the name of their cause.

On the other hand, the district court did not permit defendants to introduce evidence of their actual intent,

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[19] Defendant Scheidler's letter, specifically stating that his group will conduct "non-violent" activities is a typical example. The court of appeals in holding that Scheidler's letters were "true threats" dismisses the obvious meaning of these words by referring to them as "a catch-phrase [defendants] frequently used for their activities." 267 F.3d at 695, 702.

in response to the circumstantial evidence introduced by the plaintiffs. Thus, while there undoubtedly were agreements among some defendants to hold protests that could involve petty trespasses, there appears to have been no evidence that these defendants specifically intended to (1) commit, or have others commit, a "pattern of racketeering activity"; or (2) "facilitate" the conduct of PLAN through a pattern of racketeering activity.

The court of appeals brushes aside this lack of evidence with the conclusory assertion that the record contained evidence of "hundreds of acts committed by the defendants," but the court's own examples betray the court's error, for each example relies on a description of what unnamed "protesters" did; not what these defendants did. *See Nat'l Org. for Women v. Scheidler*, 267 F.3d at 694 ("protesters pressed four clinic staff members up against a glass entranceway"); *Id.* ("protesters grabbed at a patient's arms and legs," causing a surgical incision to reopen); *Id.* ("protestors entered clinic and destroyed medical equipment"); *Id.* ("protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics"). *See also* 267 F.3d at 702. *Claiborne Hardware* requires precision of regulation by which the particular defendant is proven to have specific intent to cause specific unprotected conduct, in turn proximately causing specifically proven damages. Evidence of what "protesters" did is irrelevant and insufficient to satisfy this "heavy" burden. *Claiborne Hardware*, 458 U.S. at 918, 934.

C. The Courts Below Failed To Judge "According To The Strictest Law"

Applying *Claiborne Hardware* to RICO, the trier of fact is constitutionally required to identify, as to each defendant, which specific acts or statements were relied on to find specific intent, and every other element of RICO liability. Similarly, the trier of fact is required to indicate the specific basis of any damage award, including identifying which act caused the damage, to ensure that "[o]nly those losses proximately caused by unlawful conduct may be recovered." *See Claiborne Hardware*, 458 U.S. at 918.

The defense asked the district court to require that "the plaintiff . . . list in the special interrogatories each particular incident they allege to constitute an act of force, threat, or violence sufficient to constitute extortion," but the judge replied, "Absolutely not. Absolutely not." *Trans.* 4495, ll. 15-19.

Although the district court ultimately included a general jury instruction requiring a finding of specific intent,[20] it used a verdict form which asked the jury precisely the wrong questions. The jury was asked to find whether "any defendant, *or any other person associated with PLAN*" violated RICO. Verdict Form,

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[20] Instruction No. 30 read: "In order to find defendants liable, you must conclude . . . that the defendants held a specific intent to further those illegal objectives." Trans. at 4949, ll. 7-12. *See also* 267 F.3d at 705.

question 4 (emphasis added).[21] The "jury did not state which defendants did these acts or when they occurred, only the total number of acts." *Nat'l Org. for Women v. Scheidler*, Memorandum Opinion and Order, p. 18 (N.D.Ill. July 16, 1999). Indeed, the jury did not even decide whether the acts were committed by a defendant at all, as opposed to "any other person."

The court of appeals affirmed, assuming that the jury made the constitutionally required specific fact findings because Instruction 30 told it to do so. 267 F.3d. at 704-5. Thus, after paying lip service to *Claiborne Hardware*, the court of appeals discarded that case's core holding by permitting a general instruction on intent to substitute for the clear, factual findings needed to determine what conduct, and which defendants, the jury was punishing.

Of course, the very purpose of the *Claiborne Hardware* standard was to ensure that a reviewing court could readily determine which specific acts of a particular defendant were subject to punishment, and which specific penalty was attributable to those acts. For all we know, the jurors may well have tried to

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[21] In response, the jury found that the defendants, or any other unidentified person associated with them, committed 21 unidentified acts or threats involving extortion in violation of federal law, 25 unidentified acts or threats involving extortion in violation of state law, 25 unidentified attempts or conspiracy to do any of these acts, and 4 unidentified acts or threats of physical violence to persons or property. See Verdict Form, question 4(a)-(h). There is no finding tying any specific defendants to any specific act.

follow Instruction No. 30, but they left no ascertainable record that they did so. Indeed, the special verdict form, which constitutes the jury's actual findings of fact, indicates the opposite, for it contains nothing but vague and aggregate findings. It was improper to *assume* that the exacting standards of *Claiborne Hardware* were met, no matter how "confident" the court of appeals was. *Scheidler*, 267 F.3d. at 705. The trier of fact was required, but failed, to make explicit findings available for scrutiny on appeal. The court of appeals was required, but failed, to conduct a de novo review, "according to the strictest law." Review should be granted so that these threats to free expression and association can be eradicated.

CONCLUSION

For all the foregoing reasons, this court should grant the respective petitions for certiorari.

Respectfully Submitted,

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